

AIR WAR COLLEGE

AIR UNIVERSITY

RELIGIOUS ACCOMMODATION FOR MILITARY MEMBERS IN THE  
TWENTY-FIRST CENTURY

by

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## **Abstract**

This paper assesses the Air Force's current policy on religious accommodation and then develops a descriptive alternative to the current policy that addresses shortfalls uncovered in the current policy. Changes in society, laws, and emerging religious trends catalyzed by the military services' unique culture have created an ambiguous social context regarding the free exercise of religion in the United States Air Force. Members and leaders lack sufficient standards by which they can test the benefits of the free expression of faith against a set of identified compelling governmental interests. The lack of definite guidance unnecessarily restricts the constitutional guaranteed free exercise of religion and denies leaders the ability to leverage the pre-existing religious beliefs of members to the mutual benefit of the individual and the organization.



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## CHAPTER ONE – INTRODUCTION

An Airman was informed he could not wear his temple garment under his battle dress uniform.<sup>1</sup> Another Airmen returning from an Ash Wednesday service was directed to remove the ashes from his forehead.<sup>2</sup> Either these members were in violation of regulations or their supervisors abridged the member's right of free exercise. Either way, for the service member it is a breakdown in good order and discipline. For the commander, it is a confusing situation regarding the free exercise of religion and the establishment of religion.

Similarly, a commander called the command Chaplain to inquire if it is permissible to attend a bible study, in uniform, just prior to duty hours at an on-base eating establishment. He is concerned because another commander was counseled for offering free tickets to a theatrical play with a religious connotation.<sup>3</sup> A senior officer in the Pentagon posited that commanders, in the current environment, are "scared" to exercise their own faith.<sup>4</sup>

This confusion does not end with bible studies and garment wear. A member applied for religious accommodation because his faith instructs him to reject immunizations. The wing chaplain and command surgeon wrote supporting letters. The request came back denied, without explanation.<sup>5</sup> In short, these examples indicate the need for the Air Force (AF) to provide a greater understanding of religious accommodation.

### **Problem Statement**

The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ...."<sup>6</sup> With regard to the religious accommodation, the challenge for the Department of Defense (DOD) is to support and defend the free exercise of religion without violating the prohibition against establishment of religion.<sup>7</sup> This dilemma is complicated by the commander's responsibility to

achieve their mission. This paper will highlight that the current guidance on religious accommodation has unintended negative effects on (1) commanders as individuals, (2) commanders as leaders, and (3) individual military members. This paper assesses the current AF policy on religious accommodation and then develops a descriptive alternative to the current policy that addresses uncovered shortfalls in the current policy.

Current guidance regarding religious accommodation leaves commanders uncertain about the limits on the expression of their own faith. Commanders and their subordinates are confused about what constitutes a commander “crossing the line” between “free exercise” and undue command influence. Commanders recognize their individual rights are limited in our military culture, but the lack of clear guidance may cause commanders to be risk adverse and needlessly restrict the lawful expression of their own faith.

Commanders are also responsible for their unit’s welfare. The AF adopted a wellness model that has four pillars: (1) social, (2) spiritual, (3) physical, and (4) emotional.<sup>8</sup> The lack of clear guidance on religious accommodation, including what constitutes “establishment”, can result in the commander deferring spiritual matters to the chaplain. This position minimizes risk, and while well-intended, could be an abdication of the commander’s responsibility for the spiritual welfare of their subordinates.

Commanders do not know when to say, “Yes,” “Yes; but,” or “No” to a member making a request for religious accommodation. The lack of clear guidance drives commanders to subject their decisions regarding religious accommodation to multiple levels of review and one “No” may end the accommodation process. This process fails to provide prompt accommodation and may result in unequal accommodation between similar units.<sup>9</sup>

The current policy places the locus on the members to request religious accommodation. This may result in many members never asking for and command never volunteering an accommodation. Members may not ask because they perceive themselves as isolated from the commander by intervening levels of supervision, rank inequality, or social circumstances. Commanders may never volunteer accommodation because they are unaware of the need, are mission focused, or lack adequate guidance to provide accommodation. Policy also requires the member to make essentially the same request each time they change duty locations.<sup>10</sup>

The current AF policy on religious accommodation does not incorporate the language in the Religious Freedoms Restoration Act or address the emerging trends regarding religious expression. Current policy also does not address the emerging interest in spirituality verses religion or the religious requirements of new faith groups. Recently, disenfranchised groups have repeatedly challenged the AF over the “establishment” of religion.

Almond, Appleby, and Sivan researched religious extremism in the United States. Extremism’s roots, are in part, found in disenfranchisement. They reported in the worst of cases, lack of accommodation can foster an environment favorable to extremism. These extremists are willing to break significant social norms in support of their religious understandings.<sup>11</sup>

### **Research Questions**

Q<sup>1</sup> How might policy on religious accommodation provide commanders adequate guidance with regard to the expression of one’s own faith?

Q<sup>2</sup> How might policy on religious accommodation provide AF commanders adequate guidance with regard to the religious accommodation of subordinates?

Q<sup>3</sup> How might policy on religious accommodation have the potential to foster disenfranchisement?

## Hypothesis

H<sup>1</sup> Current policy on religious accommodation does not provide commanders adequate guidance with regard to the expression of one's own faith and contributes to commanders unnecessarily restricting their own expression of faith.

H<sup>2</sup> Current policy on religious accommodation does not provide AF commanders adequate guidance with regard to the religious accommodation of subordinates and results in slow and inconsistent accommodation of religious requirements.

H<sup>3</sup> Current policy on religious accommodation has the potential to cultivate extremist perspectives.

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<sup>1</sup> Wing Chaplain, Email, 13 Sep 11.

<sup>2</sup> Wing Chaplain, Interview, 6 Sep 11

<sup>3</sup> Command Chaplain, Personal experience, 2011.

<sup>4</sup> Chaplain Senior Leader, Telephone Interview, 17 Aug 11.

<sup>5</sup> Wing Chaplain, Professional experience, 2007.

<sup>6</sup> Bill of Rights a Transcription. [http://www.archives.gov/exhibits/charters/bill\\_of\\_rights\\_transcript.html](http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html).

<sup>7</sup> Benjamin, Michael. Justice Justice Shall you Pursue: Legal Analysis of Religious Issues in the Army. The Army Layer. November 1988.

<sup>8</sup> Heuer, M. Tie Down Your Four Dimensions of Wellness: Physical, Emotional, Social, and Spiritual. Spokesman Magazine (January 2006).

<sup>9</sup> Chaplain Senior Leader, Telephone Interview, 17 Aug 11.

<sup>10</sup> Professional experience

<sup>11</sup> Almond, G., Appleby, S., & Sivan, E. Strong Religion: The Rise of Fundamentalism Around the World. University of Chicago Press (2003).



## CHAPTER TWO - LITERATURE REVIEW

### Law and Guidance

Americans overwhelmingly embrace greater religiosity than most other countries.<sup>12</sup> New governmental allowances for faith-based initiatives and passage of the International Religious Freedom Act are two indicators of the changing relationship between church and state.<sup>13</sup> The phrase “separation of church and state” is not found in the Constitution or the congressional record of First Amendment debates. President Jefferson penned the phrase in 1802 in a letter to an association of Baptists in Connecticut regarding his position that man owed account to God, not government, for religious beliefs.<sup>14</sup>

The Supreme Court has heard only one case on the issue of religious accommodation in the military. In 1986, the Supreme Court of the United States heard the case of *Goldman v. Weinberger*. Goldman, an ordained Orthodox rabbi, was serving on active duty in the USAF as a clinical psychologist. From 1976 to 1981 Dr. Goldman, an Orthodox Jew, was allowed to wear a yarmulke indoors as well as outdoors. Dr. Goldman wore his yarmulke while he testified as an expert witness for the defense in the courts martial of another military member. As a result, the prosecutor convinced Goldman’s commander to initiate a series of administrative and legal proceedings against Goldman. The Supreme Court of the United States narrowly ruled in favor of the military. Justice Rehnquist wrote, the military is “a specialized society separate from civilian society.” Military concepts that influenced the majority opinion were: discipline, esprit de corps, hierarchy, subordination, and professional judgment. Justice White, in a separate opinion, added uniformity to the list of military concepts that swayed his vote in favor of the military. Justice Brennan dissented, saying that Goldman’s position was protected and the AF had not presented a credible explanation as to how his wearing a yarmulke impinged on military

interest. Justice O’Conner added, the Court should have articulated a test for religious accommodation and that military members retained their basic rights. The court left balancing free expression and non-establishment to the judgment of commanders.<sup>15</sup>

The Supreme Court removed any substantive requirement for the government to justify a burden placed on the free exercise of religion by individuals (*Employment Division v. Smith*, 494 U.S. 872). In response, Congress passed the Religious Freedom Restoration Act. Under the act, the Government may not restrict religious expression without a “*compelling governmental interest*” and if a compelling interest exists, the burden imposed on the individual by the government must be in the “*least restrictive*” means.<sup>16</sup>

DOD 1300.17 (2009) directs commanders to approve requests for religious accommodation unless approval will have an adverse “impact on mission accomplishment, military readiness, unit cohesion, standards, or discipline.” The instruction does not define those terms or provide for a process.<sup>17</sup> A review of AF instructions also failed to find definitions for those terms.<sup>18</sup>

AF Instruction (AFI) 36-2706 (2010) defines religion as, “a personal set or institutionalized system of attitudes, moral or ethical beliefs and practices held with the strength of traditional religious views, characterized by ardor and faith and generally evidenced through specific religious observances.” This instruction purports on page two that its purpose is, in part, to address accommodation of religious practices, but fails thereafter to provide a single sentence of guidance specific to religious accommodation.<sup>19</sup>

With the lack of guidance in AFI 36-2706 (2010), commanders making decisions regarding religious accommodation should be aware of Article 138 of the Uniformed Code of

Military Justice. According to AFI 51-904 (1994), commanders are subject to courts martial under Article 138 for “arbitrary, capricious, or an abuse of discretion.”<sup>20</sup>

In February 2006, the AF published Revised Interim Guidelines Concerning Free Exercise of Religion to promote good order and discipline. The AF policy therein was to neither endorse nor approve religious beliefs or the lack thereof. Additionally, the guidelines support religious accommodation except when compelling “*military necessity*” prevents accommodation. Any non-accommodation must be in “*the least restrictive manner*.” The policy affirms commanders retain the free exercise of religion, but not in official capacities.<sup>21</sup>

In September 2011, the AF issued a policy letter on Maintaining Government Neutrality Regarding Religion.<sup>22</sup> The policy said chapel programs were vital to the free exercise of religion, but required commanders to delegate advertising chapel programs to a chaplain. This avoided the appearance of command endorsement. At issue is balancing the benefits of spiritual programs and command endorsement.

### **Value of Spirituality**

Existential Well Being (EWB) is an internationally recognized construct concerned with an individual’s value of the transcendent or a connection to the “Ultimate.”<sup>23</sup> Religion is for many people a building block for global beliefs. Global beliefs help individuals to make sense of the world and to adjust to difficult changes.<sup>24</sup> EWB correlates positively with quality of life,<sup>25</sup> resilience,<sup>26</sup> and coping.<sup>27</sup> Additionally, EWB negatively correlates with depression, tension, and mood disturbance;<sup>28</sup> unemployment, comorbidities, lower academic achievement, lower income;<sup>29</sup> suicidal ideation;<sup>30</sup> and major depression.<sup>31</sup> Furthermore, increased EWB both moderated and mediated the effect of uncertainty.<sup>32</sup> The extensive positive outcomes associated

with EWB should support developing a policy that equips individual Airmen's efforts to express their faith.

In 2005, a researcher examined all the houses of worship in a single town. He reported all the congregations were similar in that excessive individualism was checked by a belief in a common good. Respect for the common good was an authoritative teaching based on a belief in a higher power. Congregations differed in how congregants viewed the distance/closeness between God and humanity. Some groups thought of God as the One who had set creation in motion while others believed God could enter directly into the human experience. Spiritualists had a third view that God is an integral rather than an external being.<sup>33</sup> The variety of religious experiences necessitates a policy that includes non-traditional expressions of faith.

An added benefit of accommodating non-traditional spiritual beliefs is the language and cultural expertise that accompanies greater diversity. In fact, United States Special Operations Command created two programs that increased diversity of the staff in order to gather "atmospheric" intelligence. Atmospheric intelligence concerns itself with how US actions are perceived and received among ethnic communities.<sup>34</sup>

### **Trends, Disenfranchisement, and Extremism**

Kressel<sup>35</sup> evaluated the role of inspired hatred in terms of distinguishing between religions that are different from those that are dangerous. Inspired hatred escalates the response of adherents to a common stimulus. Religious beliefs are dangerous when the smallest of affronts requires a maximal response.

Gallagher<sup>36</sup> wrote about the history of new religious movements in America. She examined what contributes to dangerous religion in cults. Cult leaders are self-appointed, self-venerating individuals who are charismatic, domineering, and determined. Beyond leadership,

Gallagher posited that the role of conversion, violence, and the mistreatment of women and children provided insight into the level of danger a new religious movement poses to society.

Almond, Appleby, and Sivan<sup>37</sup> wrote that militant religion is most often associated when structural conditions such as social class or rank separate people into disparate groups. These structural pre-conditions combined with change, human choice, and the emergence of leadership completes the conditions that provide a fertile environment for the development of militant religious organizations.

In addition to militant movements, individual religious militants who are also military members are a threat to military security. Following the 2009 Fort Hood massacre a retired Army senior leader testified before the Senate that reform was necessary. The inability of leadership to address multiple, radical, religious statements was a breach of good order and discipline. Religious accommodation should not include extremism and that commanders should recognize and expel extremist members.<sup>38</sup> In short, commanders do not raise concerns about an individual's religious expression for fear that the individual will file a complaint.

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<sup>12</sup> Sullivan, W. F. (2009). We are All Religious Now Again. *Social Research*, 76(4), 1181-1198.

<sup>13</sup> Sullivan, W. F. (2009). We are All Religious Now Again. *Social Research*, 76(4), 1181-1198.

<sup>14</sup> (Zavaletta 1997)

<sup>15</sup> *Goldman v. Weinberger et al.*, Secretary of Defense. 475 US 573. March 25, 1986.

<sup>16</sup> Religious Freedom Restoration Act. 42 USC § 21B (1993).

<sup>17</sup> Department of Defense Instruction 1300.10. Accommodation of Religious Practices within the Military Services, 10 February 2009.

<sup>18</sup> The review included 52 series and 36 series instructions.

<sup>19</sup> Air Force Instruction 36-2706. Equal Opportunity Program Military and Civilian, 5 October 2010.

<sup>20</sup> Air Force Instruction 51-90. Complaints of Wrong Under Article 138, Uniform Code of Military Justice, June 30, 1994.

<sup>21</sup> Air Force Policy Letter. Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force, 9 February 2006.

<sup>22</sup> Air Force Policy Letter. Maintaining Government Neutrality Regarding Religion, 1 September 2011.

<sup>23</sup> Park, C. (2005). Religion as a meaning-making framework in coping with life stress. *Journal of Social Issues*, 61, 707-729.

<sup>24</sup> Park, C. (2005). Religion as a meaning-making framework in coping with life stress. *Journal of Social Issues*, 61, 707-729.

<sup>25</sup> Shin, H., Noh, D., Lee, E., Nam, S., Park, Ahn, S., et al. (2009). Correlates of existential well-being and their association with health-related quality of life in breast cancer survivors compared with the general population. *Breast Cancer Research and Treatment*, 118, 139-150.

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- <sup>26</sup> Sundararajan-Reddy (2005). The relationship between spirituality and resilience in adolescents. *Dissertation Abstracts International* (UMI No. AAT 3171006).
- <sup>27</sup> Matheis, E., Tulskey, D., & Matheis, R. (2006). The relation between spirituality and quality of life among individuals with spinal cord injury. *Rehabilitation Psychology*, 51, 265-271.
- <sup>28</sup> Mortiz, S., Quan, H., Rickhi, B., Liu, M., Angen, M., Vintila, R., Sawa, R., Soriano, J., & Toews, J. (2006). A home-base spirituality education program decreases emotional distress and increases quality of life - A randomized controlled study. *Alternative Therapies in Health and Medicine*, 12, 26-35
- <sup>29</sup> Shin, H., Noh, D., Lee, E., Nam, S., Park, Ahn, S., et al. (2009). Correlates of existential well-being and their association with health-related quality of life in breast cancer survivors compared with the general population. *Breast Cancer Research and Treatment*, 118, 139-150.
- <sup>30</sup> Taliaferro, L., Rienzo, B., Pigg, R., Miller, D., & Dodd, V. (2009). Spiritual well-being and suicidal ideation among college students. *Journal of American College Health*, 58, 83-90.
- <sup>31</sup> Maselko, J., Gilman, S. & Buka, S. (2009). Religious service attendance and spiritual well-being are differentially associated with risk of major depression. *Psychological Medicine*, 39, 1009-1017
- <sup>32</sup> McNulty, K., Livneh, H., & Wilson, L. (2004). Perceived uncertainty, spiritual well-being and psychological adaptation in individuals with multiple sclerosis. *Rehabilitation Psychology*, 49, 91-99.
- <sup>33</sup> Heelas, P. *The Spiritual Revolution: Why Religion is Giving Way to Spirituality*. Blackwell Publishing (2005).
- <sup>34</sup> USSOCOM Leader, Telephone Interview, 18 Nov 11.
- <sup>35</sup> Kressel, N. *Bad Faith: The Danger of Religious Extremism*. Prometheus Books (2007).
- <sup>36</sup> Gallagher, E. *The New Religious Movements Experience in America*. Greenwood Press (2000).
- <sup>37</sup> Almond, G., Appleby, S., & Sivan, E. *Strong Religion: The Rise of Fundamentalism Around the World*. University of Chicago Press (2003).
- <sup>38</sup> Keane, J. Testimony before the Senate Homeland Security and Governmental Affairs Committee. Retrieved from <http://search.proquest.com/docview/851963832?accountid=4332> on September 28, 2011.

## CHAPTER THREE - ANALYSIS

### Legal

How would the Supreme Court decide Goldman v. Weinberger in 2012? Historically the Supreme Court has given the military wide latitude to accomplish its important mission,<sup>39</sup> but none of those Supreme Court justices currently serve on the bench.<sup>40</sup> Additionally the law has changed with the passage of the Religious Freedom Restoration Act. Levine provides additional details that may help define the challenge a modern version of Goldman V. Weinberger poses for the AF. In his article, he points out that numerous members of the judiciary question the legitimacy of the AF's position. Dr. Goldman's supervisors had consistently given him the highest performance report marks regarding professional standards. His yarmulke became an issue of professional standards only after he testified for the defense at a courts martial. During his prior service as naval chaplain, the Navy allowed Dr. Goldman to wear his yarmulke without censure. Also, Dr. Goldman was denied an appointment by the Inspector General to redress his grievances. The AF's actions were held in *close scrutiny* by the lower courts and those court ruled against the AF, but this *close scrutiny* was overturned by the 1986 Supreme Court in a move away from closely guarding religious freedoms.<sup>41</sup>

When Congress passed The Religious Freedom Restoration Act, the highest legal standard, called *compelling governmental interest* was imposed on both the *federal government* and the *states*. In the City of Boerne v. Flores, the Supreme Court decided Congress had exceeded its authority in applying the Religious Freedom Restoration Act to the states,<sup>42</sup> but later upheld the constitutionality of the Act as it applies to the federal government and thus the military.<sup>43</sup> Article I, Section 8 of the United States Constitution provides that Congress is the authority for establishing discipline within the military.<sup>44</sup> Congress through the passage of the

Religious Freedom Restoration Act has stated that religious expression can only be curtailed when *compelling governmental interest* exists.

The use of uniformity to claim compelling state interest is more problematic due to the military's own practice. Our instructions permit numerous uniforms and various combinations. AFI 36-2903 (2011)<sup>45</sup> permits some deviations in uniforms and the deviations are seemingly illogical. For example, an installation commander may approve the wear of a religious head covering indoors where the head covering is clearly visible, but not outdoors. The regulation permits the wearing of religious headgear, but not other religious apparel. The instructions provide for members to request accommodation for the wear of religious items, but the accommodation is only good for that one installation. This is a perplexing concept because the standard in the regulation is *compelling governmental interest*, not *installation interest*. The instruction permits guard and reserve chaplains to have a beard for religious reasons, provided they are not on active duty for more than 29 days but non-chaplains in the same components do not receive the same accommodation. Essentially, uniformity does not begin on day 30, but day one. A senior Air Staff counsel confirmed that uniformity was a weak legal argument. A second legal argument is good order and discipline.<sup>46</sup>

The senior legal counsel stated that modifying religious accommodations based on past incidents prejudicial to good order and discipline are relatively easy to prove. The case becomes more difficult when a request is not granted and the effect on good order and discipline is speculative. He presented a scenario where a female Airman had permission to wear her hijab indoors. When she transferred to the Pentagon, she failed to re-seek religious accommodation, but was still allowed to wear her hijab indoors. At the Pentagon, an Army leader questioned the accommodation's effect on his service. The Airman reapplied for accommodation, but the new



accommodation was more restrictive based on good order and discipline as it effected a sister service.<sup>47</sup> Given the legal standard, one could argue that the breakdown in good order and discipline occurred when the AF issued a more restrictive accommodation to meet a *service interest*, rather than a *compelling governmental interest*. Some commanders, in deployed locations such as Saudi Arabia and Afghanistan, have ordered female members to wear local religious garb either over or in lieu of parts of their uniform. Even though some members objected, because of the religious connotation of the mandated apparel, the commanders refused to amend their orders.<sup>48</sup>

In 2010, the United States Army granted two Sikh soldiers permission to retain their beards, unshorn hair, and to wear their turban and articles of faith while in uniform. This level of religious accommodation was a return to a 36-year long Army practice that ended in 1984.<sup>49</sup>

The battle space regarding religious accommodation has changed. Evidence of extremism is found in the events of September 11<sup>th</sup>, Oklahoma City, and Fort Hood. Although Congress passed the Religious Freedom Restoration Act, the vagueness of current DOD instructions contributes to the uneven application of religious accommodation and contributes to the uncertainty of leaders.

### **Benefits of Religious Expression**

Previously presented studies indicate that spirituality generally provides positive health benefits. The AF has recognized these benefits in adopting an evidence-based model, The Four Dimensions of Wellness, which includes spirituality.<sup>50</sup> Any rubric for resolving the conflict between free exercise and non-establishment of religion ought to consider the significant health benefits members gain by the accommodation of religious expression.

## Leadership Challenges in Regard to Religion

Religious extremism is a leadership challenge. A timid leadership stance toward religion may have contributed to the massacre of 13 people and the wounding of 32 others at Fort Hood. The perpetrator had made numerous radical religious statements. His commanders at Fort Hood and prior assignments failed to discipline him, in part, because they were leery of discrimination complaints.<sup>51</sup> Commanders must balance between alienating subordinates who are lawfully expressing their faith and unwittingly permitting the subversion of good order and discipline to hide behind the cloak of religious expression. When commanders take a hands-off approach to religion, religion's power for wellbeing is lost and its potential for extremism is unchecked.

## Analysis of Current Policy

The AF's Revised Interim Guidelines Concerning Free Exercise of Religion (2006) provides a balance between free exercise and non-establishment concerns. The Guidelines echo the standard of *compelling governmental interest* found in The Religious Freedoms Restoration Act.<sup>52</sup> Unfortunately, AF processes have not changed to accommodate a *compelling interest* requirement.

As stated earlier, AF Instructions 36-2706 provides for the "accommodation of religious practice," but never specifically addresses the topic again.<sup>53</sup> Due to the lack of guidance, when members request religious accommodation through the Equal Opportunity Office, they are referred to the commander.<sup>54</sup> A talking paper on accommodation of religious practice states that equal opportunity cases are handled by the Equal Opportunity Office,<sup>55</sup> but the referenced paragraph does not address military equal opportunity concerns. Commanders have no substantive instruction regarding what *compelling governmental interests* might necessitate the curtailment of a member's religious practice and this contributes to the confusion.

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<sup>39</sup> S. Levine. Untold Stories of Goldman v. Weinberger: Religious Freedom Confronts Military Uniformity. *The Air Force Law Review*, 66, 205-224.

<sup>40</sup> Members of the Supreme Court Retrieved. <http://www.supremecourt.gov/about/members.aspx>

<sup>41</sup> Ibid.

<sup>42</sup> City of Boerne v. Flores, Bishop of San Antonio. 521 US 527 (1997)

<sup>43</sup> Air Force Talking Paper (from JA), First Amendment Legal Framework, no date.

<sup>44</sup> Unites State Constitution. <http://www.usconstitution.net/const.txt>.

<sup>45</sup> Air Force Instruction 36-2903. Dated 18 July 2011.

<sup>46</sup> Legal Senior Leader (4 October 2011), Telephone Interview.

<sup>47</sup> Legal Senior Leader (4 October 2011), Telephone Interview.

<sup>48</sup> De Wind, D. Should our Servicewomen in Afghanistan have to wear Head Scarves? The Moderate Voice. <http://themoderatevoice.com/102140/should-our-servicewomen-in-afghanistan-have-to-wear-headscarves/>.

<sup>49</sup> Elliot, S. Sikh Soldiers Allowed to Serve: Retain their Article of Faith. March 25, 2010.

<http://www.army.mil/article/36339/sikh-soldiers-allowed-to-serve-retain-their-articles-of-faith>.

<sup>50</sup> Heuer, M. Tie Down Your Four Dimensions of Wellness: Physical, Emotional, Social, and Spiritual. Spokesman Magazine (January 2006).

<sup>51</sup> Serwer, A. "The Lessons from Fort Hood." *The American Prospect* (16 February 2011).

<sup>52</sup> Air Force Policy Letter. Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force, 9 February 2006.

<sup>53</sup> Ibid #7

<sup>54</sup> Equal Opportunity Office (28 September 2011) Telephone interview.

<sup>55</sup> Air Force Talking Paper (from HC), Accommodation of Religious Practice in the Air Force, no date.



## **CHAPTER 4 - CONCLUSIONS, RECOMMENDATIONS, AND CONCERNS**

### **Conclusions**

Request for religious accommodations have increased and are likely to continue to increase as the AF becomes more religiously and spiritually diverse. The AF currently attempts to address three categories of religious accommodations: (1) Equal Opportunity, (2) Dress and Appearance, and (3) Immunizations and Chemoprophylaxis. Current policies do not specifically address how we will meet worship requirements, health care issues other than immunizations, or dietary requirements.

Despite updated laws, the current policies on religious accommodation provide insufficient guidance to commanders and supervisors regarding their personal exercise of the religious convictions. Current guidance proscribes certain activities but provides insufficient guidance on permitted expressions.

Current guidance also fails to prepare commanders to parse situations in which compelling governmental interest(s) exist. This hampers their ability to faithfully discharge their duties regarding one of the fundamental rights to which each officer swears to support and defend.

The current policy on religious accommodation also fosters disenfranchisement by requiring members to re-apply for the same religious accommodation. The current policy unduly burdens the member by placing the onus for ensuring consistent and lawful accommodation on the member. Under a compelling governmental interest standard, the court places the burden on the government. Under the current system, no checks and balances exists to ensure commanders equally apply the law regarding religious accommodations.

Uniformity is insufficient to pass the compelling governmental interest test. The use of good order and discipline is a more defensible claim, but loses its validity if one military service successfully allows the accommodation of a religious practice without a breakdown in good order and discipline and another simultaneously disallows the same practice citing the defense of good order and discipline as their rationale. Health and safety concerns are more likely to pass a compelling governmental interest test.

There are several potential courses of action available. First, DOD could request Congress to exempt the military services from the Religious Freedoms Restoration Act; however, Congress rejected a previous request. Second, the AF can implore the DOD to adopt a more comprehensive policy on religious accommodation, but detailed instructions are not DOD's norm. Third, the AF can move forward on religious accommodation just as they have on other social issues like racial integration, the opening of most AF Specialty Codes to female members, and most recently in implementing Congress' repeal of Don't Ask, Don't Tell. This third course of action is the only one that the AF controls. The below recommendations support the third course of action.

## **Recommendations**

The recommendations of the current research is intended to be descriptive rather than prescriptive. Specific prescriptive recommendations are provided as examples of how the descriptive recommendations could be implemented. There are undoubtedly many possible methods for improving religious accommodation.

First, the AF could define what *compelling governmental interests* are at stake that would likely render the service mission ineffective, unsafe, or unhealthy. *Compelling governmental interests* must be real mission-oriented interests, not hypothetical.

Second, the AF could establish a list of standing accommodations. These accommodations would be subject to command suspension, for cause, but any suspension ought to be subject to automatic and timely review by higher headquarters. Prior accommodations might serve as a starting point for establishing this list. A list of disapproved or curtailed requests for religious accommodation should also be maintained as guidance for decision-makers. The lists could be published on a public webpage.

Third, the AF could create a systematic process for automatically reviewing any new request for religious accommodation. Wing Commanders would receive the initial request for accommodation, through the member's chain of command, and provide timely approval or justification for disapproval in writing to the member. Disapproved requests should be automatically appealed to the MAJCOM/CC.

Fourth, the AF could manage the expectations of future military members. We can ensure prospective military members understand how religious accommodations are treated by referring them to the webpages on granted and denied religious accommodations.

Fifth, The AF could issue new guidance to address the boundary between supervisors' protected religious expression rights and actions that are prohibited. Guidance should be comprehensive and proactive. The Guidelines on Religious Rights and Religious Expression in the Federal Workplace do not currently apply to the military, but provide balanced guidelines that have been tested in the federal workplace and should be adopted by the Air Force.

## **Concerns and Conclusion**

While these recommendations may minimize the disparity with regard to religious accommodation in the AF, they will not address the disparity between sister services. Some sister services have granted accommodations that the AF has denied and vice-versa. This will remain a

concern at joint assignments and locations, but cannot be resolved at the AF level. By pressing forward with a comprehensive policy, the AF risks alienating its sister services, but gains the potential of setting the standard for a comprehensive policy that will lead the services as the military becomes more religiously diverse. A revised AF policy could accommodate great religious and spiritual diversity, support the rights of leaders, be subordinates to the free exercise of religion, confront religious behaviors that compromise good order and discipline, and provide for the diversity to accomplish the mission anytime, anywhere.



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